

ORIGINAL
RECEIVEDBefore the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 6 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)
)
TELEPHONE AND DATA SYSTEMS, INC.)
)
For Facilities in the Domestic)
Public Cellular Telecommunications)
Radio Service on Frequency Block B)
in Market 715, Wisconsin 8)
(Vernon), Rural Service Area)

CC Docket No. 88-1

File No. 10209-CL-P-715-88

To: The Review Board

**OPPOSITION TO
APPEAL OF ORDER DENYING INTERVENTION**

Telephone and Data Systems, Inc. ("TDS") and United States Cellular Corporation ("USCC"), by their counsel, hereby oppose the "Appeal of Order Denying Intervention" filed April 25, 1994, by Townes Telecommunications, Inc. ("TTI").

1. TTI appeals from an order of the ALJ denying its petition to intervene in this proceeding. Order, FCC 94M-270, released April 18, 1994 (ALJ). In that petition, TTI advanced two contentions to justify intervention. First, TTI claimed an economic interest in this proceeding because it is a partner of TDS in certain cellular markets and TDS is slated to acquire cellular properties in other markets in which TTI has an interest. Second, TTI argued that as an affiliate of TDS in other markets, it could provide useful information about TDS's manner of conducting business. The ALJ rejected both contentions, ruling that TTI had failed to demonstrate either a

No. of Copies rec'd
List ABCDE

gjh

tangible economic interest in the outcome or that its participation would assist in resolving the issues. Order, p. 2.

2. On appeal, TTI no longer contends that its participation would assist in resolving the issues. It now argues only that the ALJ should have granted intervention as a matter of right under §1.223(a) because TTI's claimed economic interest in the outcome makes TTI a "party in interest." For the reasons stated below, TTI's argument is without merit.

3. The interest asserted by TTI is far too tenuous and vague to qualify TTI as a party in interest in this proceeding. The gist of TTI's claim is as follows: TTI has minority interests in certain cellular licenses of which TDS is to acquire control; Commission approval of those transactions is (or will be) conditioned on any action the Commission may deem warranted by the outcome of the TDS candor issue here; the transactions may ultimately be jeopardized by an adverse resolution of that issue; hence TTI has a concrete economic interest in the outcome of this proceeding. In essence, TTI is claiming a cognizable interest in this proceeding because the Commission might decide in subsequent proceedings to revisit the transactions in which TTI is interested. That reasoning is insufficient to make TTI a party in interest here.

4. TTI's qualifications are not at issue in this proceeding. The designated issue involves TDS. And the only determi-

nation to be made in this proceeding concerning TDS's qualifications is whether TDS is qualified "to hold the cellular Block B authorization for the Wisconsin 8 (Vernon) Rural Service Area."^{1/} No determination will be made in this proceeding as to what effect, if any, an adverse resolution of the candor issue here will have on TDS's qualifications to hold any other cellular licenses (including any in which TTI may have an interest). Such determinations would be made later in separate proceedings involving those other licenses.^{2/} If the Commission does initiate such other proceedings after deciding Wisconsin 8 here, TTI will have a full opportunity to seek participation in any such proceeding that involves a license in which it holds an interest. Thus, intervention in this proceeding is not necessary to protect the interest that TTI asserts.

5. TTI cites no authority for its contention that its status as TDS's minority partner in other cellular licenses gives it a financial stake sufficient to make it a party in

^{1/} Memorandum Opinion and Order and Hearing Designation Order, FCC 94-29, released February 1, 1994, ¶44 (hereinafter "HDO") (emphasis added).

^{2/} TTI misreads the condition specified on the Commission's grant of assignment of the Texas 5 (Hardeman) cellular license (appended to TTI's "Appeal"). The grant is "conditioned on any subsequent action the Commission may take concerning the [candor] issues raised in La Star." According to TTI, this Wisconsin 8 proceeding is the "subsequent action" referred to. Appeal, p. 3. That is plainly wrong, since the HDO in this proceeding expressly limits the determination to TDI's qualifications for Wisconsin 8. Thus, "subsequent action" necessarily means action taken by the Commission to revisit and reconsider the Texas 5 assignment grant after the Wisconsin 8 proceeding.

interest here. It is well settled that an ownership interest like that held by TTI here is insufficient to confer standing to intervene. See, e.g., La Star Cellular Tel. Co., 6 FCC Rcd 1245 (1991); American Tel. & Telegraph Co., 7 RR 2d 520, 522 (1966) (shareholder status insufficient to confer standing to intervene absent a showing that interests were not represented).

6. Indeed, in La Star, the very case that gave rise to this proceeding, the Commission recognized that the ALJ was within his discretion in concluding that USCC, as a minority partner in La Star, could not intervene unless it showed a divergent financial or economic interest from La Star, indicating that La Star would not adequately serve USCC's interests. 6 FCC Rcd at 1245. The Commission held that USCC could intervene only because its own conduct was at issue and a decision could affect USCC in other proceedings. In contrast, TTI's conduct is not at issue here.^{3/}

^{3/} See also, Hertz Broadcasting of Birmingham, Inc., 46 FCC 2d 350, 352 (Rev. Bd. 1974) (intervention denied where creditors failed to show that denial of licensee's renewal application would result in loss of their investments or eliminate any recourse to them); Arizona Mobile Telephone Co., 80 FCC 2d 87, 90 (Rev. Bd. 1980) ("creditors are not generally permitted to intervene as a matter of right solely on the ground that they have a financial stake in the survival of the parties"). The rationale for this rule, as stated in Hertz, applies with equal force in this case to TTI's claimed interest as a minority partner of TDS: "All creditors of a corporation have an interest in its survival, but to grant each status as a party on those grounds alone, with the concomitant rights to submit evidence, and call and cross-examine witnesses would, in our view, render the hearing process too unwieldy." 46 FCC 2d at 352.

7. In sum, TTI fails the party-in-interest test because it has not shown a potential direct and substantial injury which could result from the outcome of this proceeding. Moreover, its interest is protected by its right to seek participation in any subsequent proceedings that involve licenses in which it holds interests. Finally, it has nothing to contribute here, since it and TDS have identical interests in the outcome. Accordingly, TTI's appeal should be denied.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: Nathaniel F. Emmons
Nathaniel F. Emmons
Andrew H. Weissman

Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Ave. - Suite 500
Washington, D.C. 20036-5383
(202) 659-4700

UNITED STATES CELLULAR CORPORATION

By: Mark D. Schneider
R. Clark Wadlow
Mark D. Schneider
Michael D. Warden

Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

May 6, 1994

CERTIFICATE OF SERVICE

I, Nathaniel F. Emmons, do hereby certify that on this 6th day of May, 1994, copies of the foregoing "Opposition to Appeal of Order Denying Intervention" were sent by first class mail, postage prepaid, to the following:

* Joseph Paul Weber, Esq.
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 644
Mail Stop 1600D1
Washington, D.C. 20554

Timothy E. Welch, Esq.
Hill & Welch
1330 New Hampshire Avenue, N.W.
Suite 113
Washington, D.C. 20036

Kenneth E. Hardman, Esq.
Moir & Hardman
2000 L Street, N.W.
Suite 512
Washington, D.C. 20036

L. Andrew Tollin, Esq.
Luisa L. Lancetti, Esq.
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, D.C. 20006

Michael B. Barr, Esq.
Hunton & Williams
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Douglas B. McFadden, Esq.
Donald J. Evans, Esq.
McFadden, Evans & Sill
1627 Eye Street, N.W.--Suite 810
Washington, D.C. 20006

Howard J. Symons, Esq.
James A. Kirkland, Esq.
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004


Nathaniel F. Emmons

* Hand Delivered